DP Vijandran v Majlis Peguam

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 17–53–94
LOW HOP BING JC
29 MARCH 1995

Legal Profession — *Practice of law — Sijil annual — Rejection of application — Whether Bar Council under peremptory duty to issue certificate once conditions of s 32(1) are fulfilled — Refusal to issue because of criminal conviction — Whether conviction fell within s 33(1)(h) — Whether notification to plaintiff to apply to court under s 34 establishes refusal, neglect or delay by Bar Council in issuing certificate — Legal Profession Act 1976 ss 32(1), 33(1)(h) & 34*

Words and Phrases — *'Order of committal' — Whether includes criminal conviction — Whether a term used in civil procedure — Legal Profession Act 1976 s 33(1)(h)*

Words and Phrases — *'Refusal' — Legal Profession Act 1976 s 34*

Words and Phrases — *'Neglect' — Legal Profession Act 1976 s 34*

Words and Phrases — *'Delay' — Legal Profession Act 1976 s 34*

The Bar Council had refused the plaintiff's application for a sijil annual ('the sijil') for 1995 under s 32 of the Legal Profession Act 1976 ('the Act') as the plaintiff had been convicted of a charge under s 193 of the Penal Code (FMS Cap 45). The Bar Council contended that the plaintiff's conviction came under s 33(1)(h) of the Act, ie that an order of commital had been made against him and that s 32 gave it a discretion whether or not to issue the sijil. The plaintiff applied to the High Court under s 34 of the Act for an order directing the Bar Council to issue him with the sijil on the grounds, inter alia, that: (i) the Bar Council was under a peremptory duty to issue the sijil once the plaintiff had satisfied all the requirements of s 32; (ii) the plaintiff's conviction did not fall within any of the categories mentioned in s 33(1) as the 'order of commital' under s 33(1)(h) was a term used in civil procedure; and (iii) the notification by the Bar Council of its decision not to issue the sijil to the plaintiff and informing him to make an application to court under s 34 of the Act showed a refusal, neglect or delay by the Bar Council in issuing the sijil.

Held, dismissing the application with costs:

(1) Section 32(1)(a) is 'subject to' ss 33 and 34, which means that the scope, application, operation, effect or implication of s 32(1)(a) is bound, restricted or limited by the provisions of ss 33 and 34 so that when the provisions of ss 33 and 34 are invoked, they will prevail while the provisions in s 32(1)(a) will then play a secondary role.

(2) Section 32(1)(a) of the Act does not render the Bar Council's function in relation to the issue of the sijil a purely mechanical function. In performing its function under s 32(1)(a), the Bar Council must at all times consider the overriding question as to whether the peculiar facts and circumstances of each particular application call for the application of ss 33 and 34. The plantiff was not entitled as of right to the issue to him of the sijil, either under s 32 or under s 33 because there was no rubber-stamping role imposed on the Bar Council.

(3) By virtue of s 33(2), the Bar Council had the discretion either to issue the sijil or notify the plaintiff that he was required to make an application under s 34. There was no evidence that the Bar Council's exercise of discretion was wrong in law or in fact. On the contrary, the court was of the view that it was correctly exercised.

(4) The expression 'order of committal' in s 33(1)(h) not only means but also includes an order of conviction which is not merely confined to a conviction for contempt of court. Therefore, it includes the plaintiff's conviction which remained legally binding.

(5) It was clear that the plaintiff was invoking the second limb of s 34(1) as an advocate and solicitor who was dissatisfied with the 'refusal, neglect or delay' in the issue to him of the sijil. However, the Bar Council's notification did not constitute any 'refusal, neglect or delay' because, first, a refusal under s 34(1) of the Act could only arise if there was a duty to issue the sijil and the Bar Council, in declining to do so, had breached that duty. Secondly, to 'neglect' in the context of s 34(1) of the Act connotes a wrongful act arising out of a failure to exercise reasonable care in the performance of a duty, as opposed to the exercise of a discretion. Where, as in this case, a discretion is conferred upon the Bar Council, then the choice of the two alternatives provided in s 33(2) does not constitute a 'neglect' under s 34(1). Thirdly, the ordinary meaning of 'delay' is the 'putting off' or 'the deferring' which connotes postponement of the performance of some act or step beyond the time when the act or step should have been performed. The Bar Council had not occasioned any delay because s 33 of the Act does not prescribe any time frame.

[Bahasa Malaysia summary

Majlis Peguam telah menolak permohonan plaintif untuk mendapatkan sijil annual ('sijil itu') bagi tahun 1995 di bawah s 32 Akta Profesion Undang-Undang 1976 ('Akta itu') kerana plaintif telah disabit atas tuduhan di bawah s 193 Kanun Keseksaan (NMB Bab 45). Majlis Peguam menegaskan bahawa sabitan plaintif termasuk dalam s 33(1)(h) Akta itu, iaitu bahawa suatu perintah komital telah dibuat terhadap beliau dan bahawa s 32 memberi Majlis Peguam budi bicara sama ada untuk mengeluarkan sijil itu atau tidak. Plaintif

telah memohon kepada Mahkamah Tinggi di bawah s 34 Akta itu untuk suatu perintah yang mengarahkan Majlis Peguam supaya mengeluarkan sijil itu kepada beliau atas dasar bahawa: (i) Majlis Peguam mempunyai kewajipan mandatori untuk mengeluarkan sijil itu sebaik sahaja plaintif dapat memenuhi semua keperluan s 32; (ii) sabitan plaintif itu tidak terangkum dalam mana-mana kategori yang disebutkan di dalam s 33(1) kerana 'perintah komital' di bawah s 33(1)(h) adalah suatu istilah yang digunakan di dalam acara sivil; dan (iii) pemberitahuan oleh Majlis Peguam tentang keputusannya supaya tidak mengeluarkan sijil itu kepada plaintif dan bahawa plaintif perlu membuat permohonan kepada mahkamah di bawah s 34 Akta itu, membuktikan keengganan, kecuaian atau kelengahan oleh Majlis Peguam dalam mengeluarkan sijil itu.

Diputuskan, menolak permohonan itu dengan kos:

(1) Seksyen 32(1)(a) 'tertakluk kepada' ss 33 dan 34, dan ini bermakna bahawa skop, penggunaan, pelaksanaan, kesan atau implikasi s 32(1)(a) adalah terikat, terhad atau terbatas oleh peruntukan ss 33 dan 34 sehinggakan apabila peruntukan ss 33 dan 34 digunakan dalam sesuatu keadaan tertentu, peruntukan ini akan diberi keutamaan manakala peruntukan s 32(1)(a) akan memainkan peranan yang kurang penting.

(2) Seksyen 32(1)(a) Akta itu tidak menyebabkan fungsi Majlis Peguam berhubung dengan pengeluaran sijil itu, suatu fungsi automatik semata-matanya. Dalam menjalankan fungsinya di bawah s 32(1)(a), Majlis Peguam perlu pada setiap masa mempertimbangkan soalan utama sama ada fakta-fakta khusus dan keadaan setiap permohonan tertentu akan mewajarkan penggunaan ss 33 dan 34. Plaintif tidak mempunyai hak untuk dikeluarkan sijil itu, sama ada di bawah s 32 ataupun s 33 kerana Majlis Peguam tidak merupakan suatu badan yang hanya meluluskan sesuatu permohonan.

(3) Mengikut s 33(2), Majlis Peguam mempunyai budi bicara sama ada untuk mengeluarkan sijil itu atau memberitahu plaintif bahawa beliau dikehendaki membuat suatu permohonan di bawah s 34. Tidak ada keterangan untuk menunjukkan bahawa pada hakikatnya ataupun di sisi undang-undang, Sebaliknya, mahkamah berpendapat bahawa budi bicara itu telah digunakan dengan betul.

(4) Ungkapan 'perintah komital' di dalam s 33(1)(h) Akta itu bukan sahaja bermakna tetapi juga termasuk suatu perintah sabitan yang tidak terhad semata-matanya kepada suatu sabitan untuk penghinaan mahkamah. Oleh itu, ia termasuk sabitan plaintif yang masih mengikat di sisi undang-undang.

(5) Adalah jelas bahawa plaintif bergantung pada cabang kedua s 34(1) sebagai seorang peguambela dan peguamcara yang tidak berpuashati dengan 'keengganan, kecuaian atau kelengahan'

dalam pengeluaran sijil itu kepadanya. Bagaimanapun, pemberitahuan Majlis Peguam itu tidak merupakan apa-apa 'keengganan, kecuaian atau kelengahan' kerana, pertamanya, sesuatu keengganan di bawah s 34(1) Akta hanya boleh timbul jika terdapat suatu kewajipan untuk mengeluarkan sijil itu dan dengan tidak berbuat demikian, Majlis Peguam telah memungkiri kewajipan tersebut. Kedua, perbuatan 'kecuaian' dalam konteks s 34(1) Akta itu mempunyai konotasi suatu perbuatan salah yang muncul daripada kegagalan untuk berhati-hati dalam melaksanakan sesuatu kewajipan, berbanding dengan penggunaan budi bicara. Di mana, seperti dalam kes ini, suatu budi bicara diberikan kepada Majlis Peguam, maka pilihan dua alternatif yang diperuntukkan di dalam s 33(2) tidak merupakan suatu 'kecuaian'. Ketiga, makna biasa perkataan 'kelengahan' ialah untuk 'menangguhkan' atau 'menunda', yang memberi konotasi bahawa pelaksanaan sesuatu tindakan atau langkah telah ditangguhkan sehingga melampaui masa bila tindakan atau langkah itu seharusnya dilakukan. Majlis Peguam tidak menyebabkan apa-apa kelengahan kerana s 33 Akta itu tidak menetapkan sebarang jangka masa sama sekali.]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No W–02–182–95.]

Notes

For a case on rejection of application for sijil annual by the Bar Council, see [1993] Mallal's Digest 1025.

For cases on the construction of the words 'delay', 'neglect' and 'refuse', see *Malayan Law Journal Words and Phrases Judicially Defined* (1990) at pp 160, 362 and 479, respectively.

Cases referred to

Benge & Pratt v Guardian Assurance Co (1915) 34 NZLR 81 (refd)
Cable (William) Ltd v Trainor [1957] NZLR 337 (folld)
Clee, Re 21 LJMC 121 (refd)
Company, Re A [1984] 3 All ER 78; [1984] 1 WLR 1090 (refd)
Government of the Federation of Malaya v Surinder Singh Kanda [1961] MLJ 121 (folld)
Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152 (folld)
King v Burrel (1840) 12 Ad & El 460 (folld)
London & Paris Banking Corp, Re (1875) LR 19 Eq 444 (folld)
Loot Ting Yee v Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors [1982] 1 MLJ 321 (refd)
Quek Thiam Ting & Anor v R [1947] MLJ 24 (folld)
R v Dayman 26 LJMC 128 (refd)
R v Paynter 26 LJMC 102 (refd)
Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd [1985] 1 MLJ 84 (folld)

A *Yip Shou Shan v Majlis Peguam* [1994] 3 MLJ 82 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 282(a)
Customs Act 1967 s 90(4)
B Legal Profession Act 1976 ss 32(1)(a), 33(1)(a)–(h), (2)(b), 34(1), 88A(1)(a), 94(3)
Penal Code (FMS Cap 45) s 193
Rules of the High Court 1980
Rules of the Supreme Court 1957
C Administration of Justice (Miscellaneous Provisions) Act 1938 s 19(1) [UK]
Justices Protection Act 1847 s 5 [UK]

Muhammad Shafee Abdullah (*Shafee & Co*) for the plaintiff.
Hj Sulaiman Abdullah (*Anita Sockalingam* and *Shamini Mahadevan* with
D him) (*Zain & Co*) for the defendant.

Cur Adv Vult

Low Hop Bing JC:

E THE APPLICATION

This is an application made by the plaintiff under s 34 (hereinafter referred to as 's 34') of the Legal Profession Act 1976 (hereinafter referred to as 'the Act') for an order directing the Bar Council (hereinafter referred to as 'the defendant') to issue him with a sijil annual.
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Unless otherwise stated, a reference to a section is a reference to that section under the Act.

FACTS

G The following facts are not in dispute:

(a) The plaintiff was admitted and enrolled as an advocate and solicitor of the High Court in Malaya on 28 January 1968 and since that date has been duly practising as an advocate and solicitor.

H (b) In 1994, the plaintiff was practising under the name and style of 'DP Vijandran Associates' (hereinafter referred to as 'the plaintiff's legal firm').

(c) The plaintiff was the sole proprietor of, and the sole lawyer in, the plaintiff's legal firm.

I (d) On 6 May 1994, the plaintiff was found guilty and convicted by the learned sessions court judge at Ipoh of a charge under s 193 of the Penal Code (FMS Cap 45) and sentenced to one month's imprisonment and a fine of RM2,000 (hereinafter referred to as 'the said conviction').

(e) The said court granted the plaintiff a stay of execution on the sentence of imprisonment pending appeal. The plaintiff was however asked to pay the fine as no stay of execution was granted.

(f) On the same day, ie 6 May 1994, the plaintiff filed a notice of appeal to the High Court against the said conviction and on 25 August 1994, the plaintiff filed his petition of appeal. The record of appeal has been completed by the sessions court and duly served. The appeal is pending hearing in the High Court, Ipoh.

(g) On 15 September 1994, the plaintiff submitted to the defendant his application for his sijil annual for the year 1995 (hereinafter referred to as 'the sijil').

(h) By a letter dated 20 October 1994, the honorary secretary of the defendant informed the plaintiff that the defendant could not issue him with the sijil because of the said conviction and drew his attention to s 34 regarding 'the necessary application to court'.

(i) By a letter dated 31 October 1994, the plaintiff asked for reconsideration of the matter.

(j) By a letter dated 15 November 1994, the honorary secretary replied that the defendant had decided to reject the plaintiff's appeal and that the plaintiff was at liberty to apply to court pursuant to s 34.

(k) Subsequently, the plaintiff wrote to the president of the defendant to reconsider the matter but received no response. Hence this application by the plaintiff under s 34.

PLAINTIFF'S CONTENTIONS

It was submitted on behalf of the plaintiff that the plaintiff should be issued the sijil on the grounds, inter alia, that:

(a) the plaintiff had satisfied all the requirements of s 32;

(b) the plaintiff did not come under any of the categories mentioned in s 33(1)(a)–(h); and

(c) the plaintiff was not satisfied with the refusal, neglect or delay in the issue to him of the sijil.

DEFENDANT'S CONTENTIONS

It was contended for the defendant that:

(a) the said conviction comes under s 33(1)(h);

(b) section 32 does not impose a duty, but rather confers a power on the defendant, to issue the sijil to the plaintiff; and

(c) the plaintiff had not succeeded in proving that he was entitled as of right to the issue of the sijil to him.

A FUNDAMENTAL QUESTIONS FOR DECISION BY THE COURT

Having had the advantage of hearing and considering all the comprehensive submissions of both the learned counsel, I am of the considered opinion that there are two fundamental questions for determination by the court. These two fundamental questions may be formulated as follows:

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(a) Having regard to the said conviction and the specific provisions of s 32(1)(a), s 33(1)(h) and s 34(1), is the defendant under a peremptory duty to issue to the plaintiff the sijil? and

(b) On the specific facts and circumstances of this case, had the plaintiff established the refusal, neglect or delay on the part of the defendant C in the issue to the plaintiff of the sijil when the defendant notified the plaintiff that he was required to make an application to the court under s 34?

Question (a): Having regard to the said conviction and the specific provisions of s 32(1)(a), s 33(1)(h) and s 34(1), is the defendant under a peremptory duty D *to issue to the plaintiff the sijil?*

It was contended on behalf of the plaintiff that since the plaintiff had submitted his application for the sijil on 15 September 1994 and having complied with the requirements of s 32, the defendant was mandatorily required to issue the sijil to the plaintiff within 21 days. It was further E contended that in rejecting the plaintiff's application on 20 October 1994 (35 days after the application), there was not only a delay on the part of the defendant, but also a breach of the mandatory requirement of s 32. In the view of the learned counsel for the plaintiff, any action by the defendant outside the 21-day limit is invalid and there is an abdication by the F defendant of the right to act under s 32, which would justify the court to cause the sijil to be issued to the plaintiff.

The defendant, on the other hand, contended that the provisions of s 32 are not mandatory in nature but are instead made subject to ss 33 and 34. The defendant also contended that in the performance of its functions G under s 32, it is not a mere rubber stamp, citing *Yip Shou Shan v Majlis Peguam* [1994] 3 MLJ 82 in support thereof.

In my judgment, one of the most important provisions which requires the determination of the court in the instant case is s 32(1)(a) which reads as follows:

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> Subject to this section and sections 33 and 34, the Bar Council shall, at any time after the month of June in the preceding year, issue a Sijil Annual to an Advocate and Solicitor within twenty-one days of an application under subsection (2) if:
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> (a) the Bar Council is satisfied that the applicant complies with that subsection and any rules made under this section.

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It is absolutely and abundantly clear to me that s 32(1)(a) has been expressly made 'subject to' ss 33 and 34. The inclusion of the expression

'subject to' in s 32(1)(a) means that this particular provision is not an independent provision and is therefore not intended to stand on its own. The scope, application, operation, effect or implication of s 32(1)(a) is bound, restricted or limited by the provisions of ss 33 and 34 so that when the provisions of ss 33 and 34 are invoked in any particular instance, these provisions being the dominant provisions will prevail or take precedence while the subservient provisions in s 32(1)(a) will then play a secondary role or take a back seat, so to speak.

In *Government of the Federation of Malaya v Surinder Singh Kanda* [1961] MLJ 121 at p 138, Neal J held that the expression 'subject to' has the effect of the words following it negativing the statement preceding it. In other words, in its application to the instant case, s 32(1)(a) is negatived by the provisions of ss 33 and 34. The learned judge referred to the judgment of Stout CJ in the New Zealand case of *Benge & Pratt v Guardian Assurance Co* (1915) 34 NZLR 81 at p 86 to the effect that 'subject to' must mean 'swallowed up' or 'negatived by'.

In my judgment, s 32(1)(a) does not render the function of the defendant, in relation to the issue of the sijil, a purely mechanical function, neither is it to be performed in a manner similar to the day following night. In performing its function under s 32(1)(a), the defendant must at all times consider and address its mind to the overriding question as to whether the peculiar facts and circumstances of each particular application do trigger, spark off, warrant or call for the application, operation or invocation of ss 33 and 34. Where the peculiar facts and circumstances of a particular application necessitate the operation of ss 33 and 34, then s 32(1)(a) must perforce give way because the defendant must proceed to invoke ss 33 and 34 as the dominant provisions, which are to be applied in preference to the subservient provisions in s 32(1)(a). In this connection, I am guided and supported by the well-considered, authoritative and weighty judgment of the Supreme Court in *Yip Shou Shan v Majlis Peguam*, which was delivered by Eusoff Chin SCJ (now Chief Justice of the Federal Court) as follows:

> We are of the view that s 32 of the Act imposes a duty on the Bar Council to process and scrutinize every application for a sijil annual. It is the Bar Council's paramount duty to ensure that only an honest, trustworthy, fit and proper advocate and solicitor should be allowed to practise. Any act of dishonesty on the part of an advocate and solicitor would bring the Bar Council and the legal profession into disrepute. The issuance of a sijil annual by the Bar Council is its recommendation to the registrar that such advocate and solicitor is a fit person to be issued a practising certificate under s 29 of the Act. If the Bar Council finds that an advocate and solicitor has failed to keep proper accounts of all moneys received by his firm and therefore he cannot deliver a clean accountant's report, the Bar Council is entitled to refuse to issue a sijil annual and consequently will not recommend to the registrar for the issuance of a practising certificate to the advocate and solicitor concerned. It is, therefore, clearly misconceived to interpret the role of the Bar Council as merely a rubber-stamping process, it having no discretion to refuse to issue a sijil annual in circumstances where clearly it

should not be issued in the public interest. To agree with the appellant's argument would render s 34 otiose in its application to s 32, bearing in mind that s 32 is expressly subject to s 34.

It is to be noted that Parliament has, immediately after s 32, provided in s 33 for the issue of the sijil in certain conditions only, and as a corollary not to be issued in any event, eg in the light of the said conviction. In his submission for the defendant, learned counsel relied upon s 33(1)(h) as the ground for sending out to the plaintiff the letter dated 20 october 1994 which notified the plaintiff that he was required to make an application to the court under s 34. Section 33(1)(h) reads as follows:

> (1) Subsection (2) shall have effect with respect to an application for a Sijil Annual by an advocate and solicitor —
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> ...
>
> (h) after having had an order of committal or an order for the issue of a writ of attachment made against him.

Learned counsel for the plaintiff submitted that the said conviction does not empower the defendant to refuse the sijil as it does not come under any of the sanctions of s 32 or s 33. He said that the 'order of committal' under s 33(1)(h) is a term used in civil procedure.

He argued that the writ of attachment is a legal historical relic under the Rules of the Supreme Court 1957, in which it was one of two processes in an action for contempt of court, the other being an order for committal. He added that with the introduction of the Rules of the High Court 1980, it ceased to exist.

He opined that if Parliament had intended to withhold a sijil upon *conviction*, it would have stated so, as has been done in ss 88A(1)(a) and 94(3). He also submitted that even if committal means commitment to prison, it does not apply to the plaintiff who has not been sent to prison as there was no warrant to the prison, as required by s 282(a) of the Criminal Procedure Code (FMC Cap 45) ('the CPC'). Further, he said that there was a stay of execution of the imprisonment term which means that the imprisonment term has not taken effect yet because of s 282(a) of the CPC.

In my judgment, I agree with the view of the learned counsel for the defendant that the said conviction comes within s 33(1)(h). That being the case, s 33(2) applies, in which event the provisions of s 32(1)(a) are restricted or negatived accordingly. Hence, under s 33(2), the defendant may in its discretion either: (a) issue the sijil; or (b) notify the plaintiff (as the applicant) that he is required to make an application under s 34. In the instant case, the defendant in the exercise of its discretion had notified the plaintiff to make an application under s 34. There is no evidence before me that the exercise of this discretion by the defendant is wrong in law or in fact. This court should be slow in interfering with the exercise of the discretion by the defendant unless it has been shown to be manifestly or palpably wrong. Indeed, I am of the considered view that the exercise of discretion by the defendant has been correctly done in the instant case.

A passing thought for the writ of attachment. After the coming into force of the Rules of the High Court 1980, the writ of attachment should have been consequentially amended by deleting it from s 33(1)(h) as it was by then no longer in existence. The deletion can be achieved by way of a legislative measure so that the anachronism can be effectively and effectually removed.

The next question which falls to be determined by the court is the meaning of the expression 'order of committal' in the first limb of s 33(1)(h). The word 'committal' has not been defined in the Act. The root word is 'commit'. In *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152, the Federal Court had the occasion to interpret the meaning of the word 'commit' in s 90(4) of the Customs Act 1967 which reads as follows:

> A senior officer of customs may suspend or cancel any permission granted under this section, if the agent *commits* any breach of this Act or of any regulation made thereunder ... (Emphasis added)

Raja Azlan Shah FJ (as His Majesty then was) at p 155 (in delivering the judgment of the Federal Court) observed as follows:

> Had the customs officer the power to cancel the agency if the agent 'commits' a breach of the Customs Act? In this context, 'commits' means 'convicted'. Giving the word that meaning, I can say with confidence that it is only if an agent is convicted of an offence under the Customs Act that his agency is liable to be suspended or cancelled.

I am guided and bound by the interpretation of the Federal Court in the above case and hold that the expression 'order of committal' under s 33(1)(h) not only means but also includes an order of conviction and such order of conviction is not merely confined to a conviction for contempt of court which is a criminal matter (see *Loot Ting Yee v Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors* [1982] 1 MLJ 321). In my judgment, the expression 'order of committal' certainly includes the said conviction which has been recorded in a court of competent jurisdiction under a written law in our country, viz the Penal Code (FMS Cap 45), s 193. The said conviction recorded against the plaintiff remains a legally binding conviction. The plaintiff has not and indeed cannot deny the existence of the said conviction. In the circumstances, I hold that the defendant has correctly relied upon s 33(1)(h) and has, in the exercise of its discretion, taken the proper and appropriate step under s 33(2)(b) and notified the plaintiff that he is required to make an application under s 34. The answer to this question is therefore in the negative.

Question (b): On the specific facts and circumstances of this case, has the plaintiff established the refusal, neglect or delay on the part of the defendant in the issue to the plaintiff of the sijil when the defendant notified the plaintiff that he was required to make an application to the court under s 34?

Section 34(1) has to be considered now. It establishes two limbs. In view of its importance, it is reproduced as follows:

A Applicant to apply to Court

(1) An advocate and solicitor who is required to make an application under this section or any advocate and solicitor who is dissatisfied with the refusal, neglect or delay in the issue to him of a Sijil Annual may apply to a Judge by originating summons for an order directing the Bar Council to issue him with a Sijil Annual.

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In the plaintiff's affidavit in support, he did not specify whether he is invoking the first limb of s 34(1) which reads: 'An advocate and solicitor who is required to make an application under this section' or the second limb which is 'any advocate and solicitor who is dissatisfied with the refusal, neglect or delay in the issue to him of a Sijil Annual'. However, from the submissions of learned counsel for the plaintiff, he is clearly relying on the second limb. It is pertinent to note that once the circumstance in s 33(1)(h) is invoked by the defendant, it then becomes necessary for the plaintiff to comply with the four-week notice under s 33(2)(b) which is a peremptory provision prescribing a mandatory requirement. Since he has not complied therewith, the plaintiff's application on 15 September 1994 for the issue to him of the sijil was premature. Notwithstanding the plaintiff's premature application, the defendant, in the exercise of its discretion under s 33(2)(b), notified the plaintiff that he is required to make an application to court under s 34. The defendant has indeed acted with scrupulous fairness towards the plaintiff.

C D E

The plaintiff's application under the second limb of s 34(1) is based on the ground that he is dissatisfied with the refusal, neglect or delay in the issue to him of the sijil. Therefore, the question to be determined by the court is whether there is any 'refusal, neglect or delay' on the part of the defendant in the issue to the plaintiff of the sijil.

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In my judgment, the defendant's letter dated 20 October 1994 to the plaintiff, informing the plaintiff that the defendant 'cannot issue' the plaintiff with the sijil in view of the said conviction and also expressly notifying him of the necessary application under s 34, together with the defendant's second letter dated 15 November 1994 reaffirming the notification to the plaintiff to apply to court under s 34 does not constitute any 'refusal, neglect or delay' in the issue to him of the sijil. It is necessary to ascertain the precise meaning of these words as used in s 34(1).

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The facts of this case clearly demonstrate that the defendant did not feel able to issue the plaintiff with the sijil but such feeling of inability to issue the sijil does not amount to a refusal at all. The ordinary meaning of the word 'refuse' is to 'decline to give': *Quek Thiam Ting & Anor v R* [1947] MLJ 24. I would add that to 'decline to give' can only amount to a 'refusal' under s 34(1) if there is a duty to give or to issue and such decline must first amount to a breach or contravention of that duty, whether arising out of contract, tort or under a statute or any subsidiary legislation made thereunder.

H I

By way of illustration, in England, justices did not 'refuse' to do an act relating to the duties of their office (s 5 of the Justices Protection Act 1847 as substituted by the Administration of Justice (Miscellaneous

Provisions) Act 1938 s 19(1), sch 2) merely because they would not do it; for when, fairly exercising a judicial discretion, they declined to do a thing, they did not 'refuse' to do it (*R v Paynter* 26 LJMC 102; *R v Dayman* 26 LJMC 128), nor did they 'refuse' when they did not hold their hands but, doing what they believed their duty, took what might be a wrong course (*Re Clee* 21 LJMC 121). Hence, a simple failure to supply written reasons for dismissal within the specified time does not of itself amount to unreasonable 'refusal', entitling the employee to an award. 'Failure' is not synonymous with 'refusal'.

The word 'neglect' is not necessarily equivalent to the word 'omitted'. Where a debt is bona fide disputed by the debtor and the debtor alleges, eg that the demand for goods sold and delivered is excessive, and says that he, the debtor, is willing to pay such sum as he is either advised by competent valuers to pay, or as he himself considers a fair sum for the goods, then in that case, he has not 'neglected' to pay, and is not within the wording of the statute (per VC George J in *Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd* [1985] 1 MLJ 84, following Jessel MR in *Re London & Paris Banking Corp* (1875) LR 19 Eq 444 at pp 445–446. See also *Re A Company* [1984] 3 All ER 78; [1984] 1 WLR 1090). 'Neglect' in the context of s 34(1) connotes a wrongful act arising out of a failure on the part of the defendant to exercise reasonable care, in the performance of a duty (as opposed to the exercise of a discretion), whether the duty arises from contract, as a result of a tort or a breach of a statutory duty. Where, as in this case, a discretion is conferred upon the defendant (rather than the imposition of a duty or obligation) then the choice of the two alternatives provided in s 33(2) does not constitute a 'neglect' as contemplated in the second limb of s 34(1). To 'neglect' doing 'is the omission to do some *duty* when the party is able to do' (per Patteson J in *King v Burrel* (1840) 12 Ad & El 460). The defendant in the instant case can only be said to be guilty of 'neglect' if it is merely performing a rubber-stamping function in the issue of the sijil under ss 32 and 33 but, as has been held by the Supreme Court in the *Yip Shou Shan* case, s 32 does not impose a rubber-stamping role on the defendant. The wording in s 33 is crystal clear in that the discretion is expressly stated and the meaning is plain and obvious.

'Delay' has been judicially defined by the New Zealand Court of Appeal in *Cable (William) Ltd v Trainor* [1957] NZLR 337 at p 345. The court adopted the ordinary meaning of the noun 'delay', ie the 'putting off' or 'the deferring'. The ordinary meaning of these latter words, in the opinion of the court, 'connotes postponement of the performance of some act or step *beyond the time when the act or step should have been performed*' (emphasis added). Applying this interpretation of the word 'delay', I am of the considered opinion that the defendant had not occasioned any delay because s 33 has not prescribed any time frame at all, neither did it provide that the issue of the sijil is to be effected as a matter of obligation or duty. So it is left to the defendant to take the necessary step or to perform the necessary act within a reasonable time or to choose one of the two alternatives under s 33 as had been done here. Section 32, on the other hand, as stated in my judgment above, is negatived or restricted in its

application here since the defendant is in actual fact invoking s 33(2)(b), in which case, s 33(2)(b) prevails.

In the ultimate analysis, in my judgment, the plaintiff is not entitled as of right to the issue to him of the sijil, either under s 32 or under s 33 because there is no rubber-stamping role imposed on the defendant either under s 32 or s 33 to issue to the plaintiff the sijil. In an application under the second limb of s 34(1), the burden is on the plaintiff to prove the following ingredients, viz:

(1) that having regard to the said conviction, the defendant is under a legal duty, under any circumstances and in any event, to issue to him the sijil; and

(2) that on the specific facts and circumstances of this case, the defendant has acted in breach of that duty by reason of the refusal, neglect or delay on the part of the defendant in the issue to him of the sijil.

The plaintiff through his affidavits, exhibits and submissions advanced on his behalf has not succeeded in discharging the said burden of proof. Viewing the plaintiff's application in its entirety, I hold that the plaintiff has failed to establish any of the aforesaid ingredients. The answer to question (b) is also in the negative. In the circumstances, I hereby dismiss the plaintiff's application with costs.

Application dismissed.

Reported by Sarojah Arianayagam